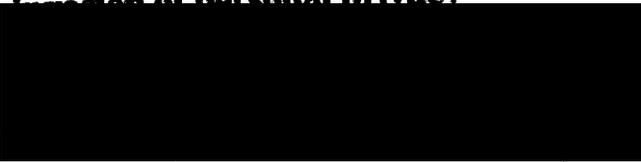




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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC 01 024 53183 Office: CALIFORNIA SERVICE CENTER Date: NOV 19 2002

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:
[Redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Arizona in June of 1998. It is engaged in the restaurant business. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner contends that although the business is a restaurant, the beneficiary's duties have been and will be primarily executive or managerial in nature.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the

alien. 8 C.F.R. 204.5(j)(5).

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter submitted with the initial petition, the petitioner provided the following position description for the beneficiary:

Functioning autonomously as president, [the beneficiary] will continue to be responsible for managing and directing all day-to-day activities of the U.S. company in its expansion as well as its operations. She will have control over and exercise wide latitude and discretionary decision-making in establishing the most advantageous courses of action for the successful management and direction of development and expansion activities.

After reviewing the petition, the director requested a more detailed description of the beneficiary's duties in the United States and a description of the staffing levels of the petitioner. The director also requested the petitioner's state and federal quarterly wage reports.

In response to the director's request, the petitioner through its counsel provided the following information regarding the beneficiary's position:

The business plan initially used to establish the entity has been successfully implemented by the executive. She is now supported by her four person staff and is free to direct the further expansion of the restaurant business. Her manager . . . takes care of supervisory functions, reporting to [the beneficiary].

The plan is to follow a conservative steady growth pattern and, when feasible expand to a second site. [The beneficiary] will be responsible for all hiring and financial decisions concerning this expansion.

The petitioner further provided its Arizona Unemployment Tax and Wage Report for the quarter ending December 31, 2000. The report reflected five employees including the president for the quarter. The petitioner also provided a list of employees identifying the employees' positions as president, waiter/assistant manager, waitress, cook, and kitchen help. The petitioner further provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 2000. The IRS Form 1120 revealed gross receipts in the amount of \$145,043, compensation of the beneficiary as an officer in the amount of \$24,015, salaries paid to employees in the amount of \$20,486, and a taxable income of \$7.

The director determined that the petitioner's description of the beneficiary's job duties demonstrated that the beneficiary would be acting in the capacity of a first-line supervisor. The director concluded that the beneficiary had not been and would not

be employed in a primarily executive or managerial capacity or that the petition organization required an executive or managerial position.

On appeal, counsel for the petitioner asserts that the beneficiary is not a first-line supervisor. Counsel also contends that the beneficiary's duties have been and will be primarily executive or managerial in nature. Counsel asserts that the beneficiary has complete control over financial matters, marketing, personnel, expansion and operations. Counsel also submits a document that identifies the individual previously identified as the cook as a manager of the restaurant.

It appears the petitioner believes that the beneficiary qualifies under section 101(a)(44)(A) and section 101(a)(44)(B) of the Act. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the beneficiary is representing he or she is both an executive and a manager.

Upon review, counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). In the initial petition, the petitioner submitted a broad position description that vaguely refers, in part, to duties such as "managing and directing all day-to-day activities of the U.S. company in its expansion as well as its operations," and "hav[ing] control over and exercis[ing] wide latitude and discretionary decision-making in establishing the most advantageous courses of action." These two statements paraphrase certain elements of the statutory definition of "managerial" and "executive" capacity without clearly describing the actual duties of the beneficiary with respect to the daily operations. See section 101(a)(44)(A)(i) and (iv) and section 101(a)(44)(B)(iii).

The petitioner's response to the director's request for evidence does not further enlighten the Service regarding the beneficiary's daily activities. The petitioner references the beneficiary's four person staff and alleges that the beneficiary directs expansion operations and that the manager takes care of supervisory functions. However, the petitioner provides confusing information regarding the identity of the manager. The petitioner had previously identified a waiter/assistant manager and had not noted any additional managerial duties for the cook. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

Counsel's assertions that the beneficiary is not a first-line supervisor and that the beneficiary's duties have been and will be primarily executive or managerial in nature is not supported in the record. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has not provided a comprehensive description of the beneficiary's day-to-day duties. The petitioner has not submitted adequate information on the responsibilities of the petitioner's other employees. The petitioner did not submit any evidence to establish that the beneficiary has actually conducted the broadly cast description of her duties, such as "direct[ing] the further expansion of the restaurant business." The petitioner's interest in expanding its restaurant business is not sufficient to establish that the beneficiary is actually pursuing such a goal. Examination of the petitioner's description of the beneficiary's job duties reveals the beneficiary to be at most a first-line supervisor of non-professional employees.

Counsel's assertion that the beneficiary has complete control over financial matters, marketing, personnel, expansion, and operations is without merit. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). Moreover, these duties appear to comprise many of the mundane tasks necessary to continue the operations of the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).

It is not clear from the director's decision whether the director relied partially on the size of the enterprise and the number of staff. However, if the director did rely partially on these factors, the director must take into consideration the reasonable needs of the enterprise. Section 101(a)(44)(C) of the Act requires that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a two-year-old company that claimed to have a gross annual income of \$145,043. The firm is doing business as a restaurant and employed the beneficiary as president, a waiter/assistant manager, a cook, a waiter, and kitchen help. The petitioner did not provide comprehensive descriptions of any of the staff and did not provide consistent information regarding any managers. The petitioner did not submit evidence that it employed any subordinate staff members that would perform the day-to-day mundane tasks of ordering food and drink

supplies, of attending to banking functions, or handling marketing activities. Based on the petitioner's lack of information on this issue, it is not possible to determine if the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial capacity. As discussed above, the petitioner has not established this essential element of eligibility.

Beyond the decision of the director, the petitioner has not established that it had been doing business for one year prior to filing the petition on October 26, 2000.

8 C.F.R. 204.5(j)(3)(i)(D) requires in pertinent part that the petitioner submit evidence demonstrating that "the prospective United States employer has been doing business for at least one year."

8 C.F.R. 214.2(l)(1)(ii)(H) states:

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

Although the petitioner was organized in June of 1998, the petitioner has submitted no evidence that it actually began doing business in the United States prior to the purchase of the restaurant in November of 1999. The record reveals that the petitioner entered into a purchase agreement to buy the restaurant in February 1999, however, the petitioner's first payment for the purchase of the restaurant appears to be November 1, 1999. The record does not provide the actual bill of sale and does not provide any documentation that the petitioner actually began operating the restaurant until some time later. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not established that it was providing goods and/or services in a regular, systematic, and continuous way at least one year prior to the filing of the petition.

Also beyond the decision of the director, the petitioner has not submitted evidence to establish that the beneficiary had been employed by the claimed parent company abroad in a managerial or executive capacity for at least one year in the three years preceding entry as a non-immigrant, as required by 8 C.F.R. 204.5(j)(3)(i)(B). Although the petitioner stated that the

beneficiary had been employed by the claimed parent company as a director, the petitioner did not submit a comprehensive job description of the beneficiary's job duties. The Service cannot determine from the broad description provided that the beneficiary was employed in a managerial or executive capacity for the overseas entity.

For these additional reasons, the petition may not be approved.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.